RECENT CASES ON PRICE MAINTENANCE

The Supreme Court of the United States for reasons good or bad has committed itself to the doctrine that an attempt on the part of a manufacturer to control the resale price of his product by contract is an offense punishable under the Sherman Anti-trust Act; that such an attempt is unfair competition within the meaning of the Federal Trade Commission Act and can be prohibited by the Trade Commission; and that the contract itself is, of course, unenforcible and not entitled to the protection of the law. The theory of the Supreme Court underlying this conclusion seems to be that "where commodities have passed into the channels of trade and are owned by dealers," the dealers are privileged to sell them at their own prices; and that the factory having "sold its product at a price satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."[1]

It is not within the scope of this article to examine the fundamentals underlying the view of the Supreme Court in the Miles case, however unsound the decision may seem. But it should be noted in passing that Justice Holmes, that rare genius of the law, dissented from the conclusion of the court and recent cases indicate that he has not yet been converted to the view of the majority. Taking the conclusion of the Supreme Court in the Miles case as the starting-point and assuming the soundness of the decision, the purpose of this article is to trace the more recent development of the law in the federal courts with respect to price maintenance and particularly to note a curious tangle into which the Supreme Court has apparently wandered.

When the Supreme Court outlawed price-maintenance contracts on the score that they suppress competition and are therefore contrary to sound public policy, it was perfectly natural that manufacturers should have immediately resorted to other

[1] *Dr. Miles Medical Co.* v. *Park & Sons*, 220 U.S. 373 (1911).

means to protect their goods from what they considered unfair conduct on the part of price-cutters. Justice Holmes, in a dissenting opinion in the Miles case, suggested one method of evading the effect of the decision—a consignment in fact instead of a nominal consignment of goods to an agent to be sold as the goods of the principal at prices to be fixed by the principal. This method gives the manufacturer the desired protection if he is in a position to incur the greater expense and inconvenience in utilizing it. Again, at least one manufacturer has notified the trade that he requires no dealer to observe a fixed price in the resale of his commodity, but that he does reserve the privilege of selling the article under its advertised trade name, and that he extends this privilege only to those dealers who do observe his suggested prices. This scheme, if legal and enforcible, defeats the purpose of the dealer who cuts prices on it for advertising purposes. Such a dealer will find that it is of little advantage to him to cut prices on an article unless he can sell it under its trade name and bring it in competition with the same article sold by other dealers at standard prices.

Another method to which manufacturers resorted to protect their goods from price-cutting for advertising purposes is the exercise of what one court has called their "undoubted right" to select their own customers. In the development of the doctrine of the invalidity of price-maintenance contracts, the courts from the beginning have assumed, and in some cases held, that the trader has the right to deal with whom he pleases; that he is under no obligation to sell to any particular person; that he may sell to one person and refuse to sell to another for any reason or for no reason; and that "we have not yet reached the stage where the selection of a trader's customers is made for him by the government."[1]

The problem in the recent cases in the federal courts has been how far a trader may in the exercise of his "undoubted right" to choose his own customers legally control the resale price of his goods. Is it legitimate for him to sell only to dealers who he knows by previous investigation will maintain his prices?

[1] Lacombe, Circuit Judge, *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46 (1915).

May he send out bulletins to the trade "suggesting" certain prices at which the goods should be sold? Suppose that he convinces dealers that the maintenance of certain prices is to the best interest of all concerned? Suppose that he asks for the co-operation of dealers in maintaining fixed prices and gets it? Suppose that he beats dealers into submission by withholding his goods from those who ignore his "suggested" prices and by selling freely to those who do? If he cannot do these things, does his "undoubted right" to select his own customers amount to anything more than an empty name? If he is to be enjoined from seeking the co-operation of his customers in maintaining prices, is not the law virtually compelling him to sell his goods against his will or go out of business? These are typical of the questions which have engaged the attention of the federal courts in recent cases.

This "undoubted right" is in a greater or less degree limited by the fact that the jury may be permitted to find from the evidence an implied contract to maintain prices. A corollary, which is deducible from the doctrine of the Miles case and which in broad principle finds ample support in the authorities, is that a contract in restraint of trade need not be formal or express; that the contract may be inferred from the conduct of the parties; and that the same legal consequences attach to a contract implied from conduct and circumstances as to one formally and expressly entered into. Speaking to this point the Supreme Court said in a recent case:

> It is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the thing actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to customers were periodically reported to the other members of the association, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.[1]

In the case of *United States* v. *Colgate & Co.*,[2] the defendant company was indicted under the Sherman Act for forming and

[1] *Eastern States Lumber Association* v. *United States*, 234 U.S. 600, 612 (1914).

[2] 250 U.S. 300 (1919).

maintaining an unlawful combination. The indictment alleged that Colgate & Co. was setting, and by its activities, successfully maintaining, resale prices on soap and other toilet articles throughout the United States. The company's activities, among other things, consisted of circularizing the trade showing uniform prices to be charged for its goods; urging all dealers to adhere to these prices; stating that no sales would be made to those who did not maintain the uniform prices; requesting information about dealers who departed from the published prices; placing price-cutters on "suspended lists"; requesting offending dealers for assurances and promises of adherence to the published prices in the future; refusing to sell to those who did not furnish such assurances and making sales to those who did. The District Court,[1] in construing the indictment, held that it did not allege that there was a contract, express or implied, between Colgate & Co. and its customers which obligated the latter to sell at published prices and accordingly decided that the defendant was not indictable under the Act. The Supreme Court on appeal said that it was bound by the construction which the District Court had placed on the indictment and affirmed its decision. Justice McReynolds, who delivered the opinion of the court, said in part:

> We cannot wholly disregard the statement (of the District Court) that "the retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the *undoubted right*[2] to do."

It will be noticed that the court decided this case on a technical rule of procedure. It accepted the trial court's construction of the indictment and refused to go into the important issue, whether or not there was enough evidence to go to the jury from which the jury might have inferred an agreement or contract for the maintenance of prices. At the same time, however, the court used language which strongly indicated that mere acquiescence in prices fixed by a manufacturer was not to be taken as evidence of a contract to maintain prices.

[1] 253 Fed. 532. [2] Italics are the author's.

In the case of *Frey & Son, Inc.* v. *Cudahy Packing Co.*,[1] which was an action by the plaintiff under the Sherman Act for damages sustained by an alleged combination on the part of the defendant, the price-maintenance policy of the defendant seems to have been much less thoroughgoing than that which was under consideration in the Colgate case. The District Court submitted the case to the jury with the instruction that it might find from the circumstances disclosed by the evidence an agreement or combination within the meaning of the Sherman Act. The Circuit Court of Appeals concluded that "there was no formal or oral agreement with jobbers for the maintenance of prices, and that, considering the doctrine approved in *United States* v. *Colgate & Co.*, the District Court should have directed a verdict for the defendant." The Supreme Court reversed this ruling of the Circuit Court of Appeals, and said:

> It is unnecessary to repeat what we said in *United States* v. *Colgate & Co.* and *United States* v. *Schrader's Son, Inc.*[2] Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination, or conspiracy might be implied from a course of dealing or other circumstances. Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobber was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise.

The decision in the Colgate case gave great hope and encouragement to traders. If the "undoubted right" to choose one's customers meant what it was generally supposed that the Colgate case stood for, then traders could accomplish by voluntary co-operation with dealers what the court had previously said that they were not entitled to accomplish by contract. The court threw doubt upon the Colgate case in the Cudahy Packing Co. case by saying that an agreement might be implied from circumstances although in another part of the decision the court seemed to affirm the Colgate decision in spirit. In the Cudahy Packing Co. case, the trial court gave the following instruction to the jury:

> I can only say to you that if you shall find that the defendant indicated a sales plan to wholesalers and jobbers, which plan fixed the price below

[1] 41 Supreme Court Reporter 451 (1921). [2] 252 U.S. 85 (1920).

which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Antitrust Act.

The Supreme Court held that this instruction was erroneous. It said that the recited facts were not sufficient to warrant a finding by the jury that there was an implied contract for the maintenance of prices and that, therefore, the case should not have been submitted to the jury. This conclusion seems eminently sound and it is unfortunate that the Supreme Court did not explain and defend it at some length. Granting the correctness of the view that an agreement may be implied from circumstances, requests for co-operation, refusals to sell goods to price-cutters, submission by price-cutters to the logic of words or to the logic of loss of business through their inability to secure certain popular goods ought not to consitute evidence of a contract to maintain prices. Acquiescence of dealers in prices suggested by manufacturers may have some probative value tending to prove a contract to maintain prices, but under the peculiar facts of these cases it seems more consistent with the hypothesis that dealers, although having the right to sell them at prices satisfactory to themselves after they get the goods, prefer to sell them at the manufacturer's price, contract or no contract, rather than run the risk of being unable to get more of the goods in the future. Moreover, if acquiescence of dealers in a price-maintenance policy is sufficient evidence to go to the jury from which the jury may infer a contract to maintain prices, then the "undoubted right" of the manufacturer to choose his own customers is little more than an empty name. It defeats its own end. The more successful the trader is in controlling the resale price by the exercise of this right the stronger the case he makes against himself.

The situation just outlined is sufficiently doubtful and precarious but it remained for the Supreme Court in the case of the *Federal Trade Commission* v. *Beech-Nut Packing Co.*,[1] decided

[1] 42 Supreme Court Reporter 150 (1922).

January 3, 1922, to hand down a decision which greatly adds to the confusion, makes impossible a satisfactory judicial solution of the problem and calls loudly for intervention by Congress.

The case originated in proceedings instituted against the Beech-Nut Co. for alleged unfair competition in interstate commerce under the Federal Trade Commission Act. The general charge made against the defendant was that it had been guilty of unfair competition in fixing and maintaining resale prices for its goods.

A general statement of the manner in which the Beech-Nut Co. carried on its business and the way in which it sought to control the resale price of its commodities is necessary to an understanding of the court's decision.

The company customarily marketed its goods through jobbers and wholesalers who in turn resold them to retailers. From time to time the company issued circulars and price-lists to the trade, showing suggested uniform prices, wholesale and retail, to be charged for its products; it selected customers whom it could trust to observe the suggested prices; it suggested and insisted that the selected customers should observe the published prices and not sell to retailers or to others who did not adhere to these prices; it asked for co-operation of all dealers in establishing and maintaining the prices; it refused to sell to anyone who disregarded the published prices or who sold to others who disregarded such prices but sold freely to those who adhered to the suggested prices; it marked its goods with numbers and symbols so that it could trace the goods when it found that prices on them were being cut; it kept a record of all customers, indicating those to whom goods were to be sold and those to whom goods were not to be sold; the company frequently "reinstated" persons who had been previously "cut off" on their assurances that they would observe the published prices in the future.

The case was heard by the Federal Trade Commission on an agreed statement of facts, one stipulation of which was:

> That the merchandising conduct of respondent hertofore defined and as herein evolved does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced.

It will be remembered that in the Colgate case the Supreme Court accepted the construction placed by the District Court on the indictment and gave judgment accordingly. One would have expected the Supreme Court in the Beech-Nut case, in view of the stipulation of fact that there was no contract for price maintenance, to have arrived at the same result which the court reached in the Colgate case. But on the contrary. The Trade Commission held that the defendant's conduct was unfair competition and ordered its desistance in a very sweeping fashion. The Circuit Court of Appeals in accordance with its understanding of the Colgate case reversed the ruling of the Commission. The Supreme Court of the United States, by a vote of five to four, modified and affirmed the order of the Trade Commission.

The decision is startling and it is startling not so much because of what the court decided as because of the basis of the decision, some of the statements which the court makes, and the decree which the court ordered to be issued against the Beech-Nut Co.

On the one hand it seems that the court adopts the view that the circumstances of the case warranted a finding that there was a contract between the defendant and the dealers for the maintenance of resale prices.

> From his course of conduct a court may infer—indeed, it cannot escape the conclusion—that competition among retail distributors is practically suppressed, for all who would deal in the company's products are constrained to sell at the suggested prices.

In arriving at this conclusion, however, the court had to fly in the face of the statement of facts on the basis of which the case was heard before the Federal Trade Commission.

> Nor is the inference overcome by the conclusion stated in the Commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained or enforced.

But the court does not stop here. It goes much farther. It adopts a view or principle which, if established and followed, materially deprives a manufacturer of control over his goods and compels him to sell them to dealers whether he wants to do so or not.

The specific facts found show suppression of the freedom of competition by methods in which the company secures the co-operation of its distributors and customers, *which are quite as effectual as agreements express or implied intended to accomplish the same purpose.*[1] By these methods the company, although selling its products at prices satisfactory to itself, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods.

Apparently the court is saying, contract or no contract, if the natural result of a manufacturer's activities is to prevent dealers from getting his goods, the manufacturer is guilty of unfair competition. This conclusion is strongly borne out by the decree which the Supreme Court directed the Commission to enter:

We are, however, of the opinion that the order[2] of the Commission is too broad. The order should have required the company to cease and desist from carrying into effect its so-called Beech-Nut policy by co-operative methods in which the respondent and its distributors, customers, and agents undertake to prevent others from obtaining the company's products other than at the prices designated by it—(1) by the practice of reporting the names of dealers who do not observe such resale prices; (2) by causing dealers to be enrolled upon lists of undesirable purchasers who are not to be supplied with the products of the company unless and until they have given satisfactory assurances of their purpose to maintain such designated prices in the future; (3) by employing salesmen or agents to assist in such plan by reporting dealers who do not observe such resale prices, and giving orders of purchase only to those jobbers and wholesalers who sell at the suggested prices and refusing to give such orders to dealers who sell at less

[1] Italics are author's.

[2] "Now, therefore, it is ordered that respondent, the Beech-Nut Packing Co., its officers, directors, servants, employees cease and desist directly or indirectly recommending, requiring, or by any other means bringing about the resale of Beech-Nut products by distributors, whether at wholesale or retail, according to any system of prices fixed or established by respondent, and more particularly by any or all of the following means:

"1. Refusing to sell to any such distributor because of their failure to adhere to any such system of resale prices.

"2. Refusing to sell to any such distributor because of their having resold respondent's said products to other distributors who have failed to adhere to any such system of resale prices.

"3. Securing or seeking to secure co-operation of its distributors in maintaining or enforcing any such system of resale prices.

"4. Carrying out or causing others to carry out a resale price-maintenance policy by any other means."

than such prices; or who sell to others who sell at less than such prices; (4) by utilizing numbers and symbols marked upon cases containing their products with a view to ascertaining the names of dealers who sell the company's products at less than the suggested prices in order to prevent such dealers from obtaining the products of the company; or (5) by utilizing any other equivalent co-operative means of accomplishing the maintenance of prices fixed by the company.

Justice Holmes in keeping with his convictions on the subject of price maintenance dissented from the conclusion of the court on grounds more or less fundamental. Justices McKenna and Brandeis concurred with him in this dissent. Justice McReynolds, who delivered the opinion of the court in the Cudahy Packing Co. case, the Colgate case, and the Schrader case delivered a separate dissenting opinion. He contended that the maintenance of resale prices by a manufacturer without resorting to contracts, express or implied, is not contrary to sound public policy and therefore unfair competition within the meaning of the Trade Commission Act; and that the agreement of facts on the basis of which the controversy was heard before the Federal Trade Commission precluded the existence of such contracts. He intimated, however, that but for this stipulation of fact a contract to maintain prices might have been inferred from the circumstances of the case.

What then is the net result of the decisions of the Supreme Court on the subject of price maintenance? The Miles case establishes pretty firmly the doctrine that a contract to maintain resale prices is against public policy and therefore not entitled to any protection from the courts. The Colgate case really stands for nothing so far as the doctrine of price maintenance is concerned. The court in this case evaded the issue and said nothing more than that it was bound to accept the construction placed by the trial court on the indictment that no contract express or implied was alleged and that the trial court was right in not applying the Sherman Act. The Cudahy Packing Co. case says that an agreement to maintain resale prices may be inferred from circumstances, but that the publication of prices, the acquiescence in those prices by dealers, the granting and withholding

of goods by a manufacturer in his attempt to control resale prices, is not enough evidence to warrant the jury in finding an illegal agreement to maintain prices. If the court had stopped at this point, the doctrine of the Supreme Court, on the assumption that the Miles case is sound, would have been consistent and probably would have afforded ample protection to manufacturers. But the decision of the court in the Beech-Nut case seems to upset everything. The conclusion of the court in this case is difficult to explain and some of its implications are rather far-reaching and startling.

Is not the court assuming considerable power over the business of an ordinary private manufacturer when it forbids him to seek the co-operation of dealers in maintaining his suggested prices? Is not this in fact a substantial restraint on the use of logic by the manufacturer to persuade dealers that it may be for the best interest of all concerned, including the public, to maintain resale prices on goods?

Again, if the test of the legitimacy of a price-maintenance policy is whether it suppresses competition in the subsequent traffic in the goods, where will the court stop in the application of this principle? Suppose that the manufacturer consigns them in fact to agents for sale at designated prices? Suppose, as suggested by Justice McReynolds in his dissenting opinion, that the manufacturer limits his customers to consumers? Has he not in both cases suppressed competition in the subsequent traffic in the goods? Has he not in both cases cut off the supply of his goods not only to the complaining dealers but to all dealers as well? Will the court hold under either hypothesis that the manufacturer is guilty of a punishable offense under the Sherman Law? Certainly not and yet the doctrine announced in the Beech-Nut case, if carried to its logical conclusion, would seem to condemn both of these practices. No one believes, however, that the Supreme Court will carry this principle to such an extreme in the event that either of the supposed cases arises. Perhaps the court will say that the trader can maintain any prices he pleases so long as he performs all the market functions

in the distribution of his goods but that if he utilizes any of the existing market structures in selling his goods he must do nothing which will restrain subsequent traffic in them.

Finally, if the manufacturer cannot engage in the activities from which he is ordered to desist in the Beech-Nut case, what becomes of his "undoubted right" to select his own customers? He is forbidden from gathering information which will assist him in selecting his customers. He is forbidden to seek the co-operation of dealers as a basis of selection. In short, it seems, under the decree which the Supreme Court framed in the Beech-Nut case, that the manufacturer's "undoubted right" to choose his own customers is an empty one—a right in the abstract but not to be exercised if it accomplishes that which the right presumably was called into existence to accomplish.

Have we not then reached the stage where the government is proposing to select a trader's customers for him? Or have we merely reached the stage where the Supreme Court has blindly wandered into a hopeless entanglement from which it must be rescued by Congressional action?

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